LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 12 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-65

ALFREDO PUCHI, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLYNN KIMERER THINNES
& GALBRAITH
111 West Monroe
Phoenix, Arizona

By John J. Flynn
Tom Galbraith
Counsel for Petitioner

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	13
Conclusion	27

Appendix A -- Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit	1a
Appendix B -- Order of the United States Court of Appeals Denying Rehearing	10a
Appendix C -- Transcript of Recorded Conversation	11a

CITATIONS

Cases: Page

Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103 .2 L.Ed.2d 9 (1957).....17,19

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)..... 17

Brady v. Maryland, 73 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....17,18,19

Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967) 23

Glasser v. United States, 315 U.S. 60, 67, 62 S.Ct. 457, 463-64, 86 L.Ed. 680 (1940)....22,23,26

McNabb v. United States, 318 U.S. 322, 63 S.Ct. 608, 87 L.Ed. 819 (1943)..... 17,20,21

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. §1684, 6 L.Ed.2d 1081 (1961)..... 21

Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)..... 17

Osborne v. United States, 351 F.2d 111, 118 (8th Cir. 1965).....22,24,25,26

United States v. Figueroa, 298 F.Supp. 1215 (S.D.N.Y. 1969)..... 14

Cases: Page

United States v. Hayutin, 398 F.2d 944 (2d Cir. 1968)..... 13

United States v. Rosenstein, 303 F.Supp. 210 (S.D.N.Y. 1969)..... 14

Weiler v. United States, 323 U.S. 606, 611, 65 S.Ct. 548, 551, 89 L.Ed. 495, 156 A.L.R. 496 (1944)..... 24

Constitutional Provisions, Statutes and Rules:

U.S. Const., Amend. V..... 3

18 U.S.C. §2..... 5
18 U.S.C. §1503..... 20
18 U.S.C. §1622..... 20
26 U.S.C. §5604(a)(1)..... 5
26 U.S.C. §5608(b)..... 5
28 U.S.C. §1254(1)..... 2,13

Fed. R. Crim. P. 15(a).....3,12,13,14,16
Fed. R. Crim. P. 52(a)..... 4,22

Other:

II Wigmore on Evidence, §278(2) (3rd Ed. 1940)..... 23

IV Wigmore on Evidence, §1405(4) (3rd Ed. 1940)..... 16

III Wright, Federal Practice & Procedure, §854, p. 358 (1969)..... 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No.

ALFREDO PUCHI, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alfredo Puchi, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 3, 1971.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix

attached hereto. No opinion was rendered by the District Court for the District of Arizona.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 3, 1971. A timely petition for rehearing was denied on June 7, 1971, and a request for a 10-day extension of time in which to file his petition for certiorari was filed within 30 days of that date. That request has not yet been ruled upon. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was it error and a denial of due process of the trial court to refuse to allow the petitioner to take the deposition of a Mexican National, residing in Mexico, who submitted an affidavit indicating that his testimony would clearly tend to exonerate the defendant when a

United States Customs Inspector promised him "safe passage" to trial, provided that he would lie by giving testimony inculpating the petitioner?

2. Was it prejudicial rather than harmless error and a denial of due process to refuse to allow the petitioner to present evidence to the jury of Governmental attempts to suborn false statements from a key witness, for the purpose of demonstrating bias and bad motive on the part of Government agents involved in the prosecution of the defendant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Federal Rules of Criminal Procedure, Rule 15(a), Depositions:

> "When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that

his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness."

Federal Rules of Criminal Procedure, Rule 52(a):

"Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

STATEMENT OF THE CASE

Background and Evidence

Mr. Puchi, along with other members of his family, operates a bonded warehouse in Nogales, Arizona. The business of the warehouse is to import liquor and other

items for exportation, principally to Mexico; in effect it is a "stopping place" for such goods. The Government does not require duties to be paid on such merchandise, but it takes measures to insure that none of it is sold in the United States without the payment of duties.

Mr. Puchi was charged in a three-count indictment* with (1) possessing liquor with intent to sell it in the United States without paying import taxes; (2) the sale of such liquor; and (3) importing liquor to Mexico and then returning it to the United States without paying duty. The jury found Mr. Puchi guilty of selling liquor without paying duty, but acquitted him of the other two charges.

---

*The statutes involved are Count I: 26 U.S.C. 5604(a)(1) and 18 U.S.C. 2; Count II: 26 U.S.C. 5604(a)(1), and 18 U.S.C. 2; Count III: 26 U.S.C. 5608(b).

The three counts of the indictment all involve the same incident. On April 4, 1969, Joseph Velez sold 15 cases of unstamped liquor to James Mitchell, a motel owner acting as a government agent. Velez is a Mexican National, who carried an account with the Puchi warehouse for goods he imported into Mexico. It is uncontested that Mitchell ordered the 15 cases of liquor through Puchi, and that Puchi arranged for Velez to make the delivery.

The essential factual controversy at trial concerned Puchi's intent in ordering the delivery.

The defendant maintained that the liquor was sold to Velez with the intention that he take the liquor to Mexico and back, pay the duty upon re-entry, and then deliver it to Mitchell; to substantiate this, the defendant showed that the price charged Mitchell was his regular

small-lot wholesale price plus duty costs (T. 640-644). Rather than exporting and then paying duty on the liquor as Puchi had contemplated, Velez evidently smuggled the liquor back into the United States without paying duty and pocketed the sum which should have gone to pay import taxes.

The Government's position was that Velez acted as Puchi's agent in working the illegal sale.

As both counsel remark in their closing arguments (T. 1024, T. 1033-1034), the case was one involving conflicting testimony, hinging largely on the credibility of the defendant and agent Dennis and Mr. Mitchell.

After 24 hours of deliberation, the foreman of the jury announced the jury did not believe it could reach a verdict (T. 1117). When it did, the jury simultaneously found Puchi guilty of selling liquor while acquitting him of the charge

of possession with intent to sell.

Joseph Velez did not appear at trial. After determining that the sale to Mitchell was illegal, four or five customs agents followed Velez to the Mexican border (T. 359) where, strangely, they permitted him to cross without arresting him (T. 499). Subsequently, Velez was indicted with Puchi as "Joe Doe." United States custom agent Dennis came to visit him at his home in Mexico and, according to Velez' affidavit, harassed him to an extent that Velez obtained an amparo, a Mexican court order similar to a restraining order, against further harassment by agent Dennis (T. 841). Being unable to convince Velez to return to the United States, Puchi made a pretrial motion to take his deposition in Sonora (R. 81), and again renewed the motion before trial (R. 96), submitting with it an affidavit executed by Velez in Mexico (R. 105) indicating his willingness

to have his deposition taken in Mexico, his unwillingness to come into the United States, and the substance of what his testimony would be. The affidavit confirms that without Puchi's knowledge Velez smuggled the liquor back into the United States and pocketed money which should have been used to pay duties (R. 106).

The Eaton-Velez Telephone Call

Before trial, in response to custom agent Eaton's request (T. 843), Velez telephoned Eaton to discuss the possibility of his being given safe passage to the United States in order to testify at the Puchi trial. A tape recording of the conversation was made by Velez, and translated for the court in chambers. A complete copy of the translation of the tape recording is set forth in Appendix C. The most crucial part can be summarized as follows:

> EATON: "He [Dennis] is going to talk to her and she can make a pardon for you."

VELEZ: "A pardon for me?"

EATON: "Yes."

VELEZ: "Uh-huh. If I should say something against Mr. Puchi, a lie?"

EATON: "Uh-huh."

VELEZ: "Or something, would they let me cross?"

EATON: "Well, you mean a lie against him or against the Government?"

VELEZ: "You know, something that would throw Mr. Puchi over-head." [A Spanish idiom meaning hurt or destroy somebody.]

EATON: "Yea, well --"

VELEZ: "Would they let me cross?"

EATON: "Yeah."

* * * *

EATON: ". . . Dennis wants to talk to you and he will tell you what he wants you to say, you know.

VELEZ: "Uh-huh."

EATON: "And this is all. In other words, you agree to tell what he wants you to tell, you know."

This conversation took place two days be-

fore trial (T. 829). As a result of it, the defendant moved again in trial for leave to take the deposition of Velez (T. 858). The court declined the request (T. 873), but thought the Velez testimony of such importance that it offered "safe passage" to Velez if he would testify and recessed for one day to permit the defendant to attempt again to convince Mr. Velez to come testify at the trial (T. 858-863). Despite Mr. Puchi's attempts, Velez refused to return to the United States, giving as his reason a general fear of "Federales" who say one thing one time and something else another (T. 873). Trial resumed without the testimony of Velez.

Judicial Treatment of the Issues

The trial court declined to permit the jury to hear the Eaton-Velez tape when it was offered to show bias and bad motive on the part of the government.

The trial court's initial theory in refusing to do so was that Eaton was acting without authority and thus not an agent for the Government in making the Velez telephone call (T. 877). After the court had made this observation on agency, however, the United States Attorney candidly admitted that there was evidence of agency which the court had not considered at the time it made that observation (T. 880).

The Court of Appeals upheld the trial court's refusal to permit the taking of the defendant's deposition, on the theory that the petitioner did not make a sufficient showing to meet the requirement of Rule 15(a) that the person to be deposed must be unable or prevented from attending trial. The Court of Appeals did find that the refusal to play the tape to the jury was error, but held it not to be prejudicial error.

This Court has jurisdiction by virtue

of 28 U.S.C., § 1254(1).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Raises an Important Question in the Interpretation of the Work "Prevented" in Rule 15(a), Federal Rules of Criminal Procedure.

This is a case in which all preconditions to the taking of a Rule 15 deposition exist. It is hard to imagine any evidence more material than the exoneration of Puchi set forth in the affidavit of Velez, the man who sold the whiskey. In upholding the trial court's refusal to grant defendant's request for the deposition, the Court of Appeals directed its attention to Rule 15(a)'s requirement that a prospective witness be "unable to attend" trial. The Court was correct in stating that a decision whether to permit a Rule 15 deposition is discretionary, United States v. Hayutin, 398 F.2d, 944

(2d Cir. 1968), and in holding that a fugitive's fear of criminal prosecution does not render him unable to attend trial within the meaning of Rule 15(a). United States v. Rosenstein, 303 F. Supp. 210 (S.D.N.Y. 1969); United States v. Figueroa, 298 F. Supp. 1215 (S.D.N.Y. 1969).

The situation here is far different, and completely unprecendented. The witness was able to attend trial, but he was prevented from doing so by an affirmative, illegal action of Government agents. Velez is a man raised in a country with no Constitution or Bill of Rights. Already he had been harassed by agent Dennis so much that he had obtained a restraining order against him from a Mexican court. Given this background, when agent Eaton promised Velez "safe passage" in exchange for perjury against Mr. Puchi, the clear implication was: the United States Government will suborn perjury in order

to convict a defendant; you will be treated with the same ruthlessness if you come to the United States. The Eaton conversation thus confirmed all of the fear of perfidy of the American "Federales" preexisting in Velez' mind. Its practical effect, therefore, was to preclude all possibility that the defendant's effort might procure Velez' attendance at trial. Indeed, agent Eaton's entire purpose in contacting Velez may have been to so terrify him as to assure the failure of Mr. Puchi's final attempt to change Velez' mind.

It is a basic rule that if one party tampers with a witness, causing him not to appear at trial, the witness' deposition may be offered by the opponent:

> "If the witness has been by the opponent procured to absent himself, this ought of itself to justify the use of his deposition or former testimony,--whether the offering party has or has not searched for him, whether he is

> within or without the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once and for all stop the tamperer from making any objection based on the results of his own chicanery." IV Wigmore on Evidence, §1405(4), (3rd Ed. 1940). (Emphasis added)

Precisely the same logic ought to obtain where, as here, the deposition has not yet been taken. Government agents committed acts having a strong tendency to discourage Velez from appearing at trial; consequently, Mr. Puchi ought to be permitted to take his deposition.

By defining "prevented" for Rule 15 (a) purposes in terms of action by the Government, two ends are served: the rule acts as a deterrent to tampering, and it avoids impossible proof problems about the state of mind of the absent witness. For obviously it would be impossible for the defendant to show or the court to judge whether, absent agent Eaton's call, the defendant would have

been able, either before or after the court guaranteed safe passage, to have persuaded Velez to appear at trial. The inexcusable conduct of the Government here should act as an estoppel to any possible advantage it might gain from that conduct.

II. The Court of Appeals' Decision Conflicts in Principle With This Court's Decision in Brady v. Maryland and in McNabb v. United States.

This Court has long held that any significant misrepresentation or suppression of evidence by the Government requires the reversal of a criminal conviction on due process grounds. Berger v. United States, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); see Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

In Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957), Castilleja, who had been sitting in a

car at night with the defendant's wife at the time the defendant killed her, told the prosecutor before trial that he had been her paramour; but the prosecutor instructed him not to volunteer this information at trial. Castilleja testified that he had been nothing more than a casual friend of the victim. In reversing Alcorta's first degree murder conviction, and remanding for a determination of whether the killing was a crime of passion, this Court held that a prosecutor's intentional suppression of evidence favorable to the accused denied him due process of law.

In Brady v. Maryland, 73 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), Brady argued that he should be punished less severely than his co-defendant, Boblit, who committed the actual killing. Following conviction, Brady's counsel learned that the prosecutor failed to

disclose a statement by Boblit admitting that Brady merely aided him in the commission of the crime. Brady holds there is a denial of due process when, upon demand, the prosecution withholds evidence favoring the accused, even though the failure was not intentional or "the result of guile." Brady v. Maryland, supra, at 373 U.S. 88.

The only difference between Alcorta v. Texas, supra, and Brady v. Maryland, supra, and the present case, is the location of the suppression. In the first two cases it occurred in the courthouse; here it happened in a telephone call to Mexico. The result to the accused is the same: valuable exculpatory evidence does not reach the jury because of misconduct on the part of the Government. Indeed, the prosecutor's actions in Brady v. Maryland are pale beside those of the Government in this case. The attempt to suppress

evidence here was deliberate, not guileless; and the evidence went to the essence of guilt or innocence, not punishment.

On the basis of its supervisory power over the administration of justice in the Federal Court system, this Court held in McNabb v. United States, 318 U.S. 322, 63 S. Ct. 608, 87 L. Ed. 819 (1943), that no confession was admissible if procured by Federal officers illegally detaining an accused rather than taking him to the United States Commissioner after his arrest. The basic principle of McNabb remains; the Government cannot be permitted to profit in a criminal prosecution from its own illegal acts:*

> "Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circum-

---

*See, 18 U.S.C., §1503, Influencing a Witness, and 18 U.S.C., §1622, Subornation of Perjury.

> stances disclosed must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. . . . " McNabb v. United States, supra, at 318 U.S. 341-2.

The rationale of the Exclusionary Rule set forth in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. §1684, 6 L. Ed. 2d 1081 (1961) is to prevent illegal acts by law enforcement offficials by depriving the Government of whatever benefit could be gained from its illegal acts.

By this principle, the Government should be deprived of the advantage of Velez' failure to testify: the defendant's request to take Velez' deposition should be granted. Such a result, while less helpful to the defendant than the appearance of Velez in court, compensates for

the disadvantage the Government has caused the defendant as much as is practical under the circumstances. It is a sanction far less punishing to the Government than the complete suppression of vital evidence often produced by the Exclusionary Rule.

III. The Court of Appeals' Decision Conflicts With This Court's Holding in Glasser v. United States and the Eighth Circuit's Holding in Osborne v. United States In That It Fails to Apply the Correct Test to Determine Whether the Trial Court's Refusal to Admit the Eaton-Velez Tape Recording Was Prejudicial.

Rule 52(a) of the Federal Rules of Criminal Procedure provides that an error will be deemed harmless only if it does not affect the substantial rights of the accused. If the error was one of such a

nature as would normally prejudice substantial rights, the burden is on the Government to demonstrate that it is harmless. Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967). The evidence here, bias and bad motive on the part of the United States Government's agents, going to their veracity, is certainly of the nature that would normally prejudice substantial rights. II Wigmore on Evidence, §278(2), (3rd Ed. 1940).

The single most significant factor in weighing whether an error is harmful is the strength of the case against the defendant. III Wright, Federal Practice & Procedure, §854, p. 358 (1969). This rule is set forth clearly in Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457, 463-64, 86 L. Ed. 680 (1940):

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially this is true where the scales of justice

> may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilty."

In determining whether a case was close, the length of jury deliberation must be used as a gauge, for it is not the business of the appellate courts in reviewing a record to substitute their judgment for that of the jury; "under our system of justice, juries long have been entrusted with that responsibility." Weiler v. United States, 323 U.S. 606, 611, 65 S. Ct. 548, 551, 89 L. Ed. 495, 156 A.L.R. 496 (1944). Thus the Eighth Circuit in Osborne v. United States, 351 F.2d 111, 118 (8th Cir. 1965) correctly uses the fact that the jury had deliberated 16 hours as a means of confirming the appellant's assertion that the case was a close and difficult one.

Here, after 24 hours of deliberation --a full working day longer than the deliberations in Osborne--the forman indicated his belief that no verdict could be reached (T. 117). When the jury did finally return, it brought back a confused, "compromise" verdict, at once acquitting Mr. Puchi of possessing liquor with intent to sell, while convicting him of selling.

The case was a close one, turning by necessity upon the credibility of Government and defense witnesses. It is always difficult for a jury to conclude that agents of the Government testify falsely without affirmative proof of their duplicity. Yet that is precisely what the trial court excluded, the only concrete evidence of the Government's bad faith available to the defendant. The jury must have been deeply troubled by the Government's case to have deliberated

for such a long period of time. The trial court's refusal to permit them to hear the Eaton-Velez tape deprived them of the one missing element necessary to confirm their suspicions--motive to lie, the bad faith of the Government's agents.

In passing upon the trial court's failure to admit the Eaton-Velez tape, the Court of Appeals gives no indication of applying any test to determine whether the error would be harmless. It brushes the question aside with a flick of the pen. It fails entirely to take into consideration the closeness of the case and the length of the jury's deliberations; thus it places itself in direct conflict with the rules of Glasser v. United States, supra, and Osborne v. United States, supra.

CONCLUSION

In this case, Government agents employed deceitful and illegal means to effectively suppress the defendant's strongest exculpatory evidence, yet astonishingly the defendant was not permitted to show the use of such devious practices to the jury.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

FLYNN KIMERER THINNES & GALBRAITH

By John J. Flynn
Tom Galbraith

Counsel for Petitioner

July, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALFREDO PUCHI, JR.,
Defendant-Appellant.
No. 25,264

[May 3, 1971]

On Appeal from the United States District Court
for the District of Arizona

Before: JERTBERG, BROWNING and TRASK, Circuit Judges.

JERTBERG, Circuit Judge:

By grand jury indictment filed on April 29, 1969, appellant Alfredo Puchi, Jr., and Joe "Doe" were accused of violating various sections of the Internal Revenue Code relating to unlawful possession, transportation, sale and relanding of non-tax and duty paid liquor. The individual referred to in the indictment as Joe "Doe" is Jose Cruz Velez, a resident and National of the Republic of Mexico.

Following trial to a jury, appellant was convicted on Count II of the indictment which reads:

> "On or about the 4th day of April, 1969, in the District of Arizona, ALFREDO PUCHI, JR. and JOE "DOE" wilfully and knowingly did sell a quantity of distilled spirits required to be stamped under the provisions of Section 5205(a)(2), Title 26, United States Code, that is, ten (10) cases which contained one hundred twenty (120) one-fifth gallon bottles of whiskey, that is, sixty (60) bottles of Haig & Haig Scotch whiskey, and sixty (60) bottles of Seagrams V.O.whiskey, the immediate containers thereof not having affixed thereto stamps

evidencing the determination of the tax thereon or indicating compliance with the provisions of §5205(a)(2), Title 26, United States Code, all in violation of 26 U.S.C. §5604(a)(1) and 18 U.S.C. §2,"

and was acquitted of the charges set forth in Counts I and III of the indictment.[1]

He was committed to the custody of the Attorney General for imprisonment for a period of one year and fined in the sum of $10,000. The execution of the sentence of imprisonment was suspended for a period of two years on condition that he violate no laws of the United States or of any state, and that he pay the fine within sixty days from the date of sentence.

26 U.S.C.A. § 5205(a) (2) provides:

"§ 5205. Stamps

(a) Stamps for containers of distilled spirits.—

• • •

(2) Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. • • •."

26 U.S.C.A. § 5604(a) (1) provides:

"§ 5604. Penalties relating to stamps, marks, brands, and containers

(a) General.—Any person who shall—

"(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a) (2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or

• • •

---

[1]Count I charged that the defendants wilfully and knowingly possessed and transported the quantity of distilled spirits required to be stamped, described in Count II, and Count III charged that the defendants with intent to defraud the United States did reland the quantity of distilled liquors described in Count II which had been withdrawn from a bonded warehouse for exportation and which had been shipped into Mexico, and which were relanded without the payment of duties thereon and without entry into the United States having been made for said spirits, in violation of 26 U.S.C. § 5608(b).

shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense."

18 U.S.C.A. § 2 provides:

"§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Appellant concedes in his reply brief that the evidence at the trial is sufficient to sustain the conviction of appellant on Count II. This fact obviates the necessity of setting forth *in extenso* a statement of the evidence at the trial.

Appellant was the secretary and treasurer of Imports-Exports, Inc., located at Nogales, Arizona. The business of the bonded warehouse was to import from abroad liquor and other items for exportation from the United States. When merchandise is so imported to a bonded warehouse, the Government does not require that duties or taxes on the imported merchandise be collected or paid. Such a warehouse is required to post a substantial bond to insure that in the event of breakage, loss, theft, or other event causing unaccountability of the imported items, the Government would receive the taxes and duties which would normally be due. Merchandise imported from abroad is shipped directly to the warehouse where it is stored under lock and key and under the constant surveillance of a Customs agent. When the merchandise is to be exported from the United States, it is transferred to a sealed vehicle for transportation either to the airport in Nogales or to the United States-Mexico border. The Customs agent accompanies the merchandise in the sealed vehicle at all times and when the goods have been either loaded into an aircraft or crossed into Mexico, certifies to that fact and signs or initials documents so reflecting it.

The arrest of appellant on April 4, 1969, arose out of a transaction which many Government agents witnessed, in which Joe "Doe" sold certain non-tax and duty paid liquor to James C. Mitchell, a private citizen, who was the operator at the Tidelands Motor Inn, located at Tucson, Arizona. Arrangements for the purchase and sale

had been made on April 3, 1969, in a telephone conversation between Mitchell and appellant, which was tape recorded with the consent of Mitchell by Customs Agent Dennis.

The taped recorded conversations mentioned above occurred on March 25, and April 3, 1969, between appellant and Mitchell. Prior to the first recorded conversation Mitchell had engaged in conversations with appellant concerning the purchase of liquor and liquor prices, and had visited with appellant at the bonded warehouse in Nogales, Arizona. Mitchell had also discussed with the local law enforcement officers and United States Customs Agents the subject of liquor which was being brought into the United States illegally, and Mitchell visited with Customs Agent Dennis at Nogales where the same subject was discussed.

On March 25, Agent Dennis visited Mitchell and stated that he had brought with him a tape recorder. Agent Dennis asked Mitchell to place a call to appellant's bonded warehouse at Nogales. Mitchell agreed to allow the Customs Agents to tape the conversation, and it was recorded. Appellant was unaware of the taping of the conversation.

On April 3, Customs Agents, including Agent Dennis, visited with Mitchell and asked Mitchell to make another call to appellant at Nogales. The conversation again was taped with the consent of Mitchell. Again appellant was unaware of the taping of the conversation.

On April 4, 1969, Mitchell went to Nogales and there met Jose Cruz Velez who drove him to a residence on the American side of the border where the liquor described in the indictment was exchanged for $630.00.

Appellant's pretrial motion to suppress the taped conversations was denied. These taped recordings and agreed transcripts of their contents were admitted in evidence at the trial. At the trial the tapes were played to the jury at the request of appellant's counsel.

Appellant's motion to suppress the taped conversations was based primarily on *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and *United States v. White*, 405 F.2d 838 (7th Cir. 1969), *cert. granted* 89 S.Ct. 1305 (1969).

In *White, supra*, the court held that the Fourth Amendment bars from evidence the testimony of government agents who related certain conversations which occurred between the defendant and a

government informant, which the agents overheard by monitoring the frequency of the radio transmitter carried by the informer and concealed on his person. On *certiorari*, the Supreme Court reversed and held that the admission of the testimony of the government agents is not barred by the Fourth Amendment. *United States v. White,* U.S. . ; (decided April 5, 1971).

Hence there is no validity in appellant's contention in this case that the admission into evidence of the telephone conversations with Mitchell, which were monitored by Customs Agent Dennis without appellant's knowledge or consent, violated his rights under the Fourth Amendment.

Appellant's other contention in respect to the admission of such evidence is that such admission violates Public Law 90-351, Title III, 18 U.S.C.A. §2510 *et seq.*, and in particular argues that Sec. 2515 of Title 18 bars the use of the recordation in evidence.

In our view the provisions of such law do not preclude the use of intercepted communications when one of the parties thereto consented to the interception. We note that the Supreme Court in *White, supra,* states:

> "Our opinion is currently shared by Congress and the Executive Branch, Title III, Omnibus Crime Control and Safe Streets Act of 1968, §2510 *et seq.*, 82 Stat. 197, 212 *et seq.*, and . . . ."

We find no error on the part of the district court in the admission of such evidence.

As above noted, indicted with appellant as Joe "Doe" was Jose Cruz Velez, a Mexican National residing in Nogales, Mexico, which is located across the border from Nogales, Arizona. Upon the return of the indictment, a bench warrant for Velez' arrest was issued. It was never served because of his absence from the United States. He remains subject to arrest on his return.

Two weeks before the trial date appellant moved the district court for an order to take the deposition of Velez outside the United States, pursuant to the provisions of Rule 15(a) of the Federal Rules of Criminal Procedure.

We first note that Rule 15(a) in relevant part states:

> "If it appears that a prospective witness may *be unable to attend or prevented from attending a trial or hearing*, that his testimony is material and that it is necessary to take his depo-

sition • • •, the court • • • may • • • order that his testimony be taken by deposition • • •." [*Italics ours.*]

The motion was supported by affidavits of appellant's counsel and two affidavits of Velez.

In his first affidavit Velez stated in substance:

That he is a Mexican citizen and a resident of Nogales, Sonora, Mexico; that he believes an indictment has been returned against him in the United States District Court for the District of Arizona, charging him as Joe "Doe," and Alfredo Puchi, Jr., as defendants, in Cause No. CR-69-151-Tucson, alleging that he has committed certain crimes against the United States; that he and his wife have been harassed by United States Customs officers in Mexico causing him to be fearful of the consequences of entering the United States of America; and that the said Customs officers have recently confiscated a truck from his brother at the border causing him additional apprehension.

The last paragraph of the affidavit states:

> "That for the foregoing reasons your Affiant has refused, continues to refuse and will continue to refuse to enter the United States of America whily (sic) any such charges continue to exist against him; that notwithstanding such facts your Affiant is willing that his deposition, under oath, be taken at Nogales, Sonora, Mexico and will make himself available for examination to truthfully answer any questions that are put to him concerning the above designated case."

There is nothing in this first affidavit, nor in Velez' second affidavit, tending to establish that he was unable to attend or prevented from attending Puchi's trial within the meaning of the quoted provisions of Rule 15(a). His only stated reason for not attending the trial was fear of arrest and prosecution if he returned to the United States.

In our view appellant's showing on the motion to take Velez' deposition was fatally deficient under the requirement contained in Rule 15(a) that the person to be deposed must be unable or prevented from attending the trial.

We do not question that the statement set forth in Velez' second affidavit was material to appellant's defense. In that affidavit Velez accepted sole responsibility for the offenses alleged in the indict-

ment and exonerated appellant from any wrong-doing in connection therewith.

Notwithstanding the defects in appellant's showing, above mentioned, the district court conducted hearings on appellant's motion and the renewals thereof during the course of the trial. In the last hearing the district court quashed the bench warrant previously issued, and issued its order granting Velez safe passage from Mexico to Tucson, Arizona, and back, for the purpose of testifying at the trial. Velez, however, notwithstanding such order, refused to attend the trial and later such bench warrant was reinstated.

The granting or denial of the motion under Rule 15(a) rests in the sound discretion of the district court. See *United States v. Hayutin*, 358 F.2d 944, 954 (2d Cir.), *cert. denied* 393 U.S. 961. (1968).

We are unable to find any abuse of discretion on the part of the district judge.

We have reviewed the rulings of the district court in rejecting an offer of proof made by appellant, and the transcript of the testimony adduced at the hearing thereof.

Appellant concedes that the laws and regulations require that containers of distilled spirits imported for sale—as opposed to containers imported for personal use,—must be stamped with red strip stamps.

There is no dispute that red strip stamps were not affixed to the containers of distilled spirits, imported for sale in the instant case, as required by law and regulations.

In such offer appellant attempted to show that in isolated instances the practice of Customs agents at the Mexican border, relating to the importation for sale of distilled liquors, was not handled in accordance with the relevant statutes and regulations; that red strip stamps were not available in the City of Nogales, Arizona; and that in isolated instances Customs agents, upon being informed that distilled spirits were being imported for sale, were noncommittal to the persons making such declarations.

Appellant argues that the offered testimony was material to the charge of wilful violation of law. The district court rejected such offer of proof on the ground that it lacked materiality. The admission or exclusion of evidence of this character, for the purpose described, rests in the sound discretion of the district court.

We find no abuse of such discretion.

In the course of defense testimony, appellant produced William Eaton, a Customs Inspector, as a witness. His testimony was heard by the court outside of the presence of the jury. He testified that he had spoken to Velez at Nogales, Sonora, Mexico and had then spoken to Customs agent John Dennis, who was a law enforcement officer of the Treasury Department and was in charge of the investigation into the activities of appellant, concerning the possibility of securing Velez as a witness against appellant.

Velez telephoned Eaton and Velez had the telephone conversation tape recorded. The tape recording of such conversation was played to the court out of the presence of the jury. From such taped conversation appellant contends that Eaton implied to Velez that Velez should "lie" against appellant in return for a grant by the Government of free passage between Mexico and the United States. After hearing the testimony of Mr. Dennis concerning his activities and knowledge of the Eaton-Velez episode, also out of the presence of the jury, the court refused to admit the tape recording and the testimony of Eaton and Dennis into evidence.

Appellant contends that the testimony adduced at the hearing, and the tape recording, should have been received for the purpose of showing the jury the bias, prejudice and bad motive of the Government agents involved in the investigation and prosecution of appellant.

The basis of the court's ruling was that Eaton had acted without authority in contacting and conversing with Velez.

While we incline to the view that the district court erred in refusing to receive the proffered testimony and tape recording into evidence, after reviewing all the facts and circumstances in the record and considering the limited purpose for which they were proffered, it is our view that such ruling was not prejudicially harmful to appellant.

As noted earlier in this opinion, the tape recorded conversations between appellant and Mitchell were received in evidence over appellant's objection. By stipulation of counsel, the tape recordings were played to the jury during the course of the trial. After deliberating for some period of time, the jury requested to hear the tape recordings replayed. Over objection of counsel the tape recordings were replayed, and one of them was played a third time. Appellant

contends that the district court, in allowing the jury to hear the tapes during deliberations, abused its discretion. Appellant argues that such replaying unduly emphasized the weight to be given to such evidence, and the judgment of conviction should be reversed for such reason.

We find no error on the part of the district court in acceding to the jury's request that such recordings be replayed. See *United States v. DePalma*, 414 F.2d 394, 395 (9th Cir. 1969).

Finally, appellant contends that the verdicts of the jury finding appellant not guilty of Count I, and not guilty of Count III, and guilty on Count II, are so inconsistent that the verdict of guilty on Count II cannot stand.

We do not agree. See *Dunn v. United States*, 284 U.S. 390 (1932); and *United States v. Mangiona*, 414 F.2d 642 (9th Cir. 1969).

On this appeal a new point is raised by appellant in his reply brief which was not raised in appellant's opening brief, nor on his motion for a new trial in the district court. We refuse to consider such new point on this appeal.

The judgment of conviction is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALFREDO PUCHI, JR., Defendant-Appellant.	)	NO. 25,264 O R D E R

On Petition for Rehearing

Before: JERTBERG, BROWNING and TRASK, Circuit Judges.

The petition for rehearing, filed by appellant in the above case, is denied.

/s/ Gilbert H. Jertberg
United States Circuit Judge

APPENDIX C

(The tape recording was played, with Mrs. Hermila Aros acting as interpreter, as follows:)

MRS. AROS: "Miss, will you please give me the time." She says: "It is 11:10, 11:02, eleven and two minutes," she says.

(Telephone rings.)

MRS. AROS: He says: "Hello," and then someone says: "Pelon?" Then he says again: "Who is speaking?" He says: "Bill Eaton."

(The following proceedings taken from the tape:)

"Mr. Eaton: Say I talked to Dennis.

"Mr. Velez: Si.

"Mr. Eaton: And there isn't going to be court tomorrow.

"Mr. Velez: No.

Mr. Eaton: There won't be court until Tuesday.

Mr. Velez: Uh-huh.

"Mr. Eaton: And so he is going to call the U. S. Attorney, you know, the woman in Tucson

"Mr. Velez: Uh-huh.

"Mr. Eaton: And talk to her about getting a pardon for you, you know.

"Mr. Velez: Uh-huh.

"Mr. Eaton: And so he told me that he'd call her in the morning and then he would call me. What time do you go to work tomorrow?

"Mr. Velez: Oh, about 10:00 o'clock.

"Mr. Eaton: About 10:00 o'clock. Do you want to talk to him?

"Mr. Velez :Huh?

"Mr. Eaton: Do you want to talk to him?"

MRS. AROS: When he asked him: "Do you want to talk to him," he says: "With whom," in Spanish.

MR. FLYNN: Then he says: "With Dennis," I think.

MRS. AROS: So then when he asked: "With Dennis?". "I don't know yet," he says. He says: "How do you see it?"

I don't know whose voice that is, but he says: "I am going to talk to him in the morning." Mr. Eaton's voice. When he said: "How do you see it," what did he say, I have forgotten now. You will have to make it shorter because it is hard —

When he says: "You, how do you see it?" He says: "Well, I am going to talk to him in the morning.".

He says: "He is going to talk to her and she can make a pardon for you." So he says: "A pardon for me?" And he said: "Yes."

And he says: "Uh-huh." "If I should say something against Mr. Puchi,. a lie?" "Mr. Eaton: "Uh-huh."

MRS. AROS: "Or something, would they let me cross?"

"Mr. Eaton: Well, you mean a lie against him or against the Government?"

MR. AROS: After that question he says: "You know, something that would throw Mr. Puchi overhead."

THE COURT: I didn't hear the last thing you said.

MRS. AROS: It is an expression to hurt somebody or destroy them.

"Mr. Eaton: Yeah, well —"

MRS. AROS: "Would they let me cross?" And he answered: "Yeah."

He says: "Do you understand?" And he says: "Would they let me cross?" And he answered: "Yeah."

"Mr .Eaton: Yeah, well, he can't do anything to you. I wouldn't worry about Puchi, the whole thing is, in other words, Dennis wants to talk to you and he will tell you what he wants you to say, you know.

"Mr. Velez: Uh-huh.

"Mr. Eaton: And this is all. In other words, you agree to tell what he wants you to tell, you know.

"Mr. Velez: Uh-huh.

"Mr. Eaton: And that's all. You don't have to tell any more other than this one thing, you know.

"Mr. Velez: Yes.

"Mr. Eaton: Well, anyway, he is going to call the U. S. Attorney about getting a pardon for you in the morning, then he will call me and then we'll come over to the store and see you."

MRS. AROS: He says: "Yes, but I say one thing."

"Mr. Eaton: Uh-huh."

"To be sure. If I say something how can I say it, something that will affect Mr. Puchi?

"Mr. Eaton: Uh-huh."

MRS. AROS: "You know." Turn it back a little bit.

Then he said: "Uh-huh," again.

"A lie?"

"Mr. Eaton: Uh-huh."

MRS. AROS: "A lie," again and he said:: "Uh-huh." "A lie" twice. And then he said: "Uh-huh" twice.

"A lie," twice. He said: "A lie" twice.

THE COURT: We have heard that twice.

MR. FLYNN: I think it is that many times, Your Honor.

MISS DIAMOS: He has been backing, so I don't think Mr. Flynn is in a position to say that.

MRS. AROS: Back up to where he said "mentira" again.

"A lie," one lie, "a lie." "Will they let me cross with my passport?" "And they won't do anything to me across the line?"

He said: "No." "Uh-huh."

"But if I say a lie that I should say —"

"Mr. Eaton: Yeah, because they are going to give you a pardon so you can testify, see.

"Mr. Velez: Si.

"Mr. Eaton: And then you won't have any more problems. But if you don't testify then you will have to go to jail if you ever come back over here.

"Mr. Velez: Ah, yes.

"Mr. Eaton: Yeah, even twenty years from now. Anyway, I just talked to Dennis and he said okay, he will talk to the —"

MRS. AROS: In Spanish he says he will talk with the judge. I didn't get the rest of that, it wasn't clear.

(Tape portion replayed.)

"I will talk with the judge in the morning to talk about a pardon." And the other fellow said: "Yes."

Then he says: "Okay." Then he says: "We'll see." After that he says: "Anyway, we'll see you in the morning then."

MRS. AROS: "Bueno" means okay, all right.

"Mr. Eaton: About 10:00 or 11:00 o'clock?"

MRS. AROS: He says "Yes," then he says: "Hey, how can I tell you, if I happen to say something against Mr. Puchi and I do cross, that Mr. Dennis would say to me '"You can cross,' they won't do anything to me?" He says: No."

"If I say a lie, it doesn't matter?" He says: "No matter?" And he answered: "No."

"Mr. Eaton: "As long as you testify."

MRS. AROS: "As long as you testify," he says, and the other fellow says: "All right, all right."

"Mr. Eaton: Okay."

MRS. AROS: "I am going to think about it yet," he says, and he says: "Okay." Or: "It is all right." And he says: If I should call you."

"Mr. Eaton: Okay, but anyway I'll see you tomorrow about 10:00 or 11:00 o'clock."

MRS. AROS: He started to say: "He can't do anything to you," and he finished off, I mean in Spanish he started and then he finished off in English. The other fellow said: "All right." He said: "Don't be afraid." He said "No?" And they started laughing.

He says: "Okay." The other fellow started laughing and saying: "I don't know about it." Mr. Eaton said: "Tomorrow then." And the other fellow said: "Okay."

(End of interpretation of tape.)